

**In the
Supreme Court of Missouri**

BLAEC JAMES LAMMERS,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from Polk County Circuit Court
Thirty-Eighth Judicial Circuit
The Honorable William Roberts, Senior Judge**

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant was charged in the Circuit Court of Polk County with assault in the first degree, making a terroristic threat, and armed criminal action. (L.F. 1-3). Appellant was convicted of assault in the first degree and armed criminal action following a bench trial held January 30, 2014. (L.F. 14, Tr. 2-129).

Appellant contests the sufficiency of the evidence to support his convictions. The evidence at trial showed the following:

In November 2012, Appellant lived with his mother and father in Polk County. (Tr. 6). Appellant was on prescription drugs for depression and he had been hospitalized four times in 2009 for psychiatric problems. (Tr. 7-8, 16-17). One of Appellant's hospitalizations occurred following a psychotic episode he had at Walmart in October 2009. (Tr. 24-25).

On November 12, 2012, Appellant purchased a .22 caliber military style long rifle from Annette Lakey at Walmart, as well as ammunition for the rifle. (Tr. 97-99). The following day, Appellant purchased a Windham Weaponry .223 caliber rifle from Jeff Murray at Walmart, as well as ammunition for the rifle. (Tr. 92-94, State's Exhibit 5). Appellant and his girlfriend later went to the apartment of Ethan Mason in Bolivar and showed Mason, who had experience with rifles, the guns he had purchased. (Tr. 100-103). Mason and Appellant took the guns to the farm of Mason's

grandmother, where Mason assisted Appellant in sighting the rifles and explained to Appellant how to load the rifles. (Tr. 103). Appellant shot about twenty-five rounds that day. (Tr. 104). When they finished shooting, Mason took the rifles to his apartment because Appellant didn't want the guns at his house. (Tr. 105). Appellant later tried to leave the guns with his friend Cody but Cody didn't want the guns, so Appellant left the guns and ammunition with his girlfriend's father, Kevin Dybdall. (Tr. 65-66, 105, 109-110, 115, State's Exhibit 5).¹

About 4:30 p.m. on November 15, 2012, Appellant's mother received a phone call from the father of Appellant's girlfriend, Kevin Dybdall, who told her he was storing two guns for Appellant. (Tr. 12-13, 20, 113-114). This caused Appellant's mother to become concerned as to where Appellant had obtained the guns. (Tr. 12). Appellant's mother called Appellant and told him he should not have guns, to which Appellant replied, "Yes, I know." (Tr. 12). Around 9:30 that same evening, Appellant's mother was doing Appellant's laundry when she found a receipt in Appellant's jeans showing he had purchased a gun at Walmart. (Tr. 10).

¹ After Appellant was arrested, Dybdall turned the guns over to the Bolivar police. (Tr. 114, 116-117).

Later on November 15, Appellant's mother drove to the sheriff's department and showed them the receipts and shared her concern regarding Appellant's mental illness and his possession of guns. (Tr. 14, 21-22). She wanted the sheriff's department to be aware that Appellant had purchased this gun and to keep an eye on him, but not to arrest Appellant. (Tr. 14-15, 21-22). Appellant's mother was afraid that Appellant would try to kill himself, not that he would hurt others. (Tr. 14-15, 24).

Bolivar Police Officer Mike Sly received a call from his lieutenant regarding a wellbeing check for Appellant: specifically, that Appellant's mother was worried that he had not taken his medication and that he had possibly purchased two guns and might do something. (Tr. 28-29, 34-35). Officer Sly located Appellant at Sonic in Bolivar with his girlfriend. (Tr. 29).

Appellant was not placed under arrest, nor was he placed in handcuffs or restrained in any way. (Tr. 29-30, 36-37). Officer Sly told Appellant that his mother had called and was worried about him, and Appellant stated he was still taking his medication. (Tr. 29). When Officer Sly asked Appellant about purchasing guns, Appellant admitted he had gotten two guns and planned on going hunting, although he lacked a hunting license. (Tr. 29).

Bolivar Police Detective Dustin Ross arrived at Sonic and told Appellant he had some information regarding a recent purchase Appellant had made at Walmart and asked Appellant if he would come down to the

police department and talk to him, and Appellant agreed to do that. (Tr. 29-30, 33, 36). Appellant walked to Detective Ross's unmarked car, got into the front passenger seat, and went down to the police department. (Tr. 30, 36-37).²

Upon arrival at the police station, Appellant went into an interview room with Detectives Ross and Gorman, with Officer Coots coming in later. (Tr. 37-38). Detective Ross patted Appellant down for weapons but did not take anything from him. (Tr. 37-38). Appellant had his cell phone with him during the course of the interview, which would not have been permitted had he been under arrest. (Tr. 38). Appellant was not in handcuffs during the interview. (Tr. 38). Detective Ross told Appellant he was not under arrest but went ahead and gave Appellant *Miranda*³ warnings, and after asking Appellant if he understood them, Appellant replied that he did. (Tr. 38-42, 50-52, State's Exhibit 5).

During the interview, Appellant stated first that he had bought the guns to go hunting. (State's Exhibit 5). Appellant had never been hunting, nor had he applied for a hunting license, nor had he even taken the required

² It was against police policy to allow a person who had been arrested to ride up front without handcuffs. (Tr. 31-32).

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

hunter education course prior to obtaining a hunting license. (State's Exhibit 5). Because of this, and because neither of the guns Appellant acquired were typically used for hunting, Detective Ross believed Appellant was concealing the truth about why he had obtained the guns. (State's Exhibit 5).

Although Appellant stated that his parents didn't want him to have guns in the home, Appellant next claimed that he had procured the guns in order to impress his father, to which Detective Ross replied that he still believed Appellant was lying. (State's Exhibit 5). Appellant admitted that he practiced to learn how to use the guns. (State's Exhibit 5).

Appellant admitted that he had watched a film entitled "April Showers," a dramatization of the April 20, 1999 massacre at Columbine High School in Colorado. (State's Exhibit 5). Watching the film caused Appellant to think what would happen if he did that. (State's Exhibit 5). Appellant was also aware of the mass shooting which had occurred less than four months earlier (July 20, 2012) inside of a movie theater in Aurora, Colorado, during a screening of the film "The Dark Knight Rises." (State's Exhibit 5). Appellant was aware of the upcoming weekend premiere of "The Twilight Saga: Breaking Dawn - Part 2" on November 16, 2012. (State's Exhibit 5).

Appellant recognized that the shooters in both of those cases were loners who suffered from mental illness. (State's Exhibit 5). Appellant admitted that he hated taking his medications for his own mental illness. (State's Exhibit 5).

Appellant admitted that he had thoughts of shooting somebody and that specifically, he had thoughts of shooting people at a movie theater. (Tr. 60, 63, State's Exhibit 5). Appellant later decided that shooting people at Walmart presented a better choice of a target, as there were lots of people there and he could replenish his supply of ammunition. (Tr. 63-64, State's Exhibit 5). Appellant's plan was to walk in and just start shooting at random targets and then turn himself into police. (State's Exhibit 5). Appellant knew he needed to practice shooting first, as he had never shot a gun before. (State's Exhibit 5).

Following a court-ordered mental examination, the trial court found Appellant mentally competent to stand trial, which Appellant told the court was an appropriate order. (L.F. 18-24, Tr. 3-4). Appellant waived jury trial. (L.F. 33, Tr.3). Appellant did not testify or present any evidence. (Tr. 125-128). After hearing all of the evidence, the court sustained Appellant's motion for judgment of acquittal on Count II, making a terroristic threat. (Tr. 85). The court found Appellant guilty of assault in the first degree and armed

criminal action and sentenced Appellant to concurrent terms of fifteen years imprisonment. (L.F. 14-15, 34-35).⁴

The court of appeals, Southern District, affirmed Appellant's convictions and sentences on March 31, 2015. *State v. Lammers*, 2015 WL 1477749 (Mo. App. S.D. 2015). This Court ordered this cause transferred on June 30, 2015.

⁴ Although the docket sheets show that a sentencing hearing was held on March 20, 2014, (L.F. 15), Appellant has not included a transcript of that proceeding in the record on appeal.

ARGUMENT

I.

The trial court did not err in entering a judgment against Appellant convicting him of assault in the first degree because sufficient evidence existed that Appellant took a substantial step toward the commission of the offense.

A. Standard of Review.

In reviewing the sufficiency of the evidence in a judge-tried case, an appellate court must determine whether there was sufficient evidence from which the trial court could have found the defendant guilty beyond a reasonable doubt. *State v. Young*, 172 S.W.3d 494, 496 (Mo. App. W.D. 2005).

The appellate court must accept as true all evidence tending to prove guilt, together with all reasonable inferences that support the finding, and must ignore all contrary evidence and inferences. *Young*, 172 S.W.3d at 497. The appellate court does not weigh the evidence or decide the credibility of the witnesses, but defers to the trial court. *Id.*

Under Supreme Court Rule 27.01(b), the findings of the court in a bench-tried criminal case shall have the force and effect of the verdict of a jury. *State v. Crawford*, 68 S.W.3d 406, 408 (Mo. banc 2002). The standard for reviewing the sufficiency of the evidence in a court-tried case is the same as

in a jury-tried case. *State v. Condict*, 952 S.W.2d 784, 785 (Mo. App. S.D. 1997).

Reasonable inferences may be drawn from both direct and circumstantial evidence. *State v. Salmon*, 89 S.W.3d 540, 546 (Mo. App. W.D. 2002). Circumstantial evidence alone can be sufficient to support a conviction. *State v. Mosely*, 873 S.W.2d 879, 881 (Mo. App. E.D. 1994). Circumstantial evidence is afforded the same weight as direct evidence. *Hutchison v. State*, 957 S.W.2d 757, 767 (Mo. banc 1997). The reliability, credibility, and weight of the witnesses' testimony are for the fact finder to determine. *State v. Sumowski*, 794 S.W.2d 643, 645 (Mo. banc 1990).

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the United States Supreme Court emphasized the deference given to the trier of fact. The Court stated:

This inquiry does not require a court to ask itself whether it believes that the evidence at trial established guilt beyond a reasonable doubt. Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319.

B. There was sufficient evidence that Appellant took a substantial step toward the commission of the offense.

Appellant was charged in Count I with the class B felony of assault in the first degree. (L.F. 1). Specifically, the State charged that Appellant purchased weapons, practiced with the weapons, and planned to shoot persons and that such conduct was a substantial step toward the commission of the crime of attempting to kill or cause serious physical injury to unknown persons at the Walmart store in Bolivar and was done for the purpose of the assault. (L.F. 1).

To be found guilty of first-degree assault for attempting to kill or attempting to cause serious physical injury, one must, with the purpose of committing that offense, take a substantial step toward committing it. *State v. Whalen*, 49 S.W.3d 181,186 (Mo. banc 2001). To act purposely means that it is the actor's conscious object to engage in certain conduct or to cause a certain result, not that he or she act with malice. *Whalen*, 49 S.W.3d at 187.

A “substantial step” is conduct which is strongly corroborative of the firmness of the actor’s purpose to complete the commission of the offense. §564.011, RSMo, 2000. The attempt statute does not require that an actual and specific attempt be made to perform each and every element of the crime. *State v. Kendus*, 904 S.W.2d 41, 43 (Mo. App. S.D. 1995). Moreover, a

defendant's overt act need not be the ultimate step toward or the last possible act in the consummation of the crime attempted. *Id.*

Regarding Appellant's purpose to kill or cause serious physical injury, it has long been recognized that in many cases "[s]ince intent is a state of mind, there is no direct proof of it." *State v. Carter*, 541 S.W.2d 692, 695 (Mo. App. E.D. 1976). "Thus the rule is that intent may be inferred from the circumstances, and becomes a question of fact for the jury." *Id.*

Here, the evidence was sufficient for the court to find that Appellant had the purpose to kill or cause serious physical injury to unknown persons at Walmart. The evidence showed that Appellant purchased a .22 caliber military style long rifle at Walmart, as well as ammunition for the rifle. (Tr. 97-99). The following day, Appellant purchased a Windham Weaponry .223 caliber rifle at Walmart, as well as more ammunition, bringing his total to about 400 rounds. (Tr. 92-94, State's Exhibit 5). Appellant and Ethan Mason took the guns to the farm of Mason's grandmother, where Mason assisted Appellant in sighting the rifles and explained to Appellant how to load the rifles. (Tr. 103). Appellant shot about twenty-five rounds that day. (Tr. 104). When they finished shooting, Mason took the rifles to his apartment, as Appellant said he didn't want the guns at his house. (Tr. 105). Appellant later tried to leave the guns with his friend Cody, but Cody didn't want the guns, so Appellant left the guns and ammunition with his girlfriend's father, Kevin

Dybdall. (Tr. 65-66, 105, 109-110, 115, State's Exhibit 5). A reasonable factfinder could have inferred that Appellant planned his assault and prepared for it by purchasing two assault rifles and over 400 rounds of ammunition, then enlisted the help of his friend in learning how to load, sight, and fire the guns, and finally had the guns placed in locations away from his home, so as to keep his parents from discovering them.

As to his reasons for procuring two assault rifles as well as hundreds of rounds of ammunition, Appellant first told police that he had bought the guns to go hunting. But Appellant had never been hunting, and he had not applied for a hunting license or taken the required hunter education course prior to obtaining a hunting license. (State's Exhibit 5). Because of this, and because neither of the guns Appellant acquired were typically used for hunting, Detective Ross believed Appellant was concealing the truth about why he had obtained the guns. (State's Exhibit 5). Appellant next claimed that he had procured the guns in order to impress his father, to which Detective Ross replied that he still believed Appellant was lying. (State's Exhibit 5). Exculpatory statements, when proven false, evidence a consciousness of guilt and therefore bear directly on the issue of guilt or innocence. *State v. Zerban*, 412 S.W.2d 397, 399- 400 (Mo.1967); *State v. Ross*, 606 S.W.2d 416, 425 (Mo. App. E.D. 1980).

Appellant admitted that he had watched a film entitled “April Showers,” a dramatization of the April 20, 1999 massacre at Columbine High School in Colorado. (State’s Exhibit 5). Watching the film caused Appellant to think what would happen if he did that. (State’s Exhibit 5). Appellant was also aware of the mass shooting which had occurred less than four months earlier (July 20, 2012) inside of a movie theater in Aurora, Colorado, during a screening of the film “The Dark Knight Rises.” (State’s Exhibit 5). Appellant was aware of the upcoming weekend premiere of “The Twilight Saga: Breaking Dawn - Part 2” on November 16, 2012. (State’s Exhibit 5). Appellant recognized that the shooters in both of those cases were loners who suffered from mental illness. (State’s Exhibit 5). Appellant admitted that he hated taking his medications for his own mental illness. (State’s Exhibit 5). A rational factfinder could have inferred that Appellant had studied mass shootings in similar situations and identified with the perpetrators of such crimes, with whom he shared the experience of mental illness.

Appellant admitted that he had thoughts of shooting somebody and that specifically, he had thoughts of shooting people at a movie theater. (Tr. 60, 63, State’s Exhibit 5). Appellant later determined that shooting people at Walmart presented a better choice of a target, as there were lots of people there and he could replenish his supply of ammunition. (Tr. 63-64, State’s Exhibit 5). Appellant’s plan was to walk in and just start shooting at random

targets and then turn himself into police. (State's Exhibit 5). Appellant knew he needed to practice shooting first, as he had never shot a gun before.

(State's Exhibit 5). This evidence was sufficient to allow the trial court, as the fact finder, to conclude that Appellant had the purpose to kill or cause serious physical injury to unknown persons at Walmart..

The above evidence was sufficient to allow the court to find that Appellant took a substantial step toward the commission of assault. By the time Appellant sat down with law enforcement officials, he had already viewed a film about the Columbine shooting, wondered what would happen if he did that, and then bought two assault rifles along with hundreds of rounds of ammunition. Having never shot a gun, Appellant then had an acquaintance teach him how to load, sight, and fire the guns. In addition to his shooting practice, Appellant lied to others about the guns and kept everything secret from his parents. Taken together, a rational finder of fact could have concluded that Appellant's actions and course of conduct were a substantial step toward the commission of assault in the first degree.

In *State v. Rollins*, 321 S.W.3d 353 (Mo. App. W.D. 2010), the Western District affirmed the defendant's convictions for assault in the first degree, armed criminal action, and unlawful possession of a weapon. In affirming the conviction for assault in the first degree, the court held that the defendant's voluntary abandonment of his plan to kill a high school principal was not a

defense. *Rollins*, 321 S.W.3d at 358-363. Thus, actions taken by Appellant following the substantial step he made toward attempting to kill or attempting to cause serious physical injury would not serve to nullify his earlier actions which constituted the attempt. “[O]nce a ‘substantial step’ has been taken, the abandonment of criminal purpose comes too late to avoid liability.” *Rollins*, 321 S.W.3d at 360.

Appellant relies on *State v. Dublo*, 243 S.W.3d 407 (W.D. 2007), which in turn relied on this Court’s opinion in *State v. Verweire*, 211 S.W.3d 89 (Mo. 2006) (App. Br. 15). But in both of those cases, a critical circumstance was that nothing impeded the defendants from accomplishing their goals. *See State v. Hill*, 408 S.W.3d 820, 824 (Mo.App.E.D.2013) (distinguishing the case from *Verweire* and *Dublo*, in part, because the defendant did not retreat).⁵

⁵ The decision in *Verwiere* has been distinguished in several cases. *See State v. Rayburn*, 457 S.W.3d 760, 762-763 (Mo. App. E.D. 2014); *State v. Reese*, 436 S.W.3d 738, 742 & n.4 (Mo. App. W.D. 2014) (also distinguishing *Dublo*); *State v. Hill*, 408 S.W.3d 820, 823-824 (Mo. App. E.D. 2013) (also distinguishing *Dublo*); *Doss v. State*, 376 S.W.3d 719, 722 (Mo. App. W.D. 2012); *State v. Davies*, 330 S.W.3d 775, 792 (Mo. App. W.D. 2010); *State v. Rollins*, 321 S.W.3d 353, 362 (Mo. App. W.D. 2010); *State v. McDaniel*, 254 S.W.3d 144, 146 (Mo. App. E.D. 2008).

In *Verweire*, which involved a petition for writ of *habeas corpus* subsequent to a guilty plea of assault in the first degree with the defendant claiming actual innocence, the defendant grabbed the victim while holding a .25 caliber handgun to the victim's chest and his head, but then voluntarily retreated from the altercation without ever having tried to fire the handgun. *Verweire*, 211 S.W.3d at 91-92. This Court granted *Verweire* relief when it held that this conduct did not constitute a substantial step toward commission of the offense of first-degree assault, and thus, there was no factual basis for his guilty plea on the assault charge, as the defendant lacked the intent to cause serious physical injury. *Verweire*, 211 S.W.3d at 92.

In *Dublo*, the defendant held a knife close to the necks of two of his co-workers and stated that he would kill one of them if they didn't come with him, but he then let the victims go. *Dublo*, 243 S.W.3d at 408-409. The court held that the fact that the defendant held a knife to the throats of two men but did not injure or attempt to injure either one with the knife was not enough to support a finding of the requisite specific intent because the record was devoid of any strong corroborating evidence to support an attempt to cause serious harm. *Dublo*, 243 S.W.3d at 409.

By contrast, here police acted on the concern expressed by Appellant's mother and engaged him in questioning which ultimately resulted in his arrest – and thus prevented him from completing his planned assault. Unlike

Verweire or *Dublo*, there was no apparent sudden change of heart on the part of Appellant showing that he independently decided to break off his assault.

In *Verweire*, the Court distinguished the factual situation before it from a scenario where the intervention of law enforcement prevented a defendant from carrying out the completed crime. *Verweire*, 211 S.W.3d at 92. The Court cited *In re J_R_N*, 687 S.W.2d 655 (Mo. App. S.D. 1985), which involved a defendant who was convicted of assault in the first degree, and where the court found that the defendant's act of attempting to enter the hotel with a lug wrench in his hand coupled with his announcement that he was there "to assault the manager" was sufficient to show that the defendant had taken a substantial step toward the commission of the offense of first-degree assault, despite the subsequent intervention of the police. *J__R__N__*, 653 S.W.2d at 656.⁶

⁶ In *Dublo*, the Western District's analysis and application of *Verweire* seemed to indicate that in order to establish the requisite intent to cause serious physical injury, the State would have had to show that Appellant had cut the victim without actually causing serious physical injury, which is an untenable position, or that a law enforcement officer had intervened before Appellant could have acted on his intent to cause serious physical injury.

Here, there was strong, corroborative evidence of Appellant's purpose, which included Appellant's purchase, firing, and hiding of the guns in the space of a few days, coupled with his admissions to police that he decided that Walmart was the better target because of the number of people and the abundance of ammunition. And, as in *J___R___N___*, it was the intervention of law enforcement which prevented Appellant from carrying out the completed crime.

Despite not raising it in his point relied on, Appellant also argues that the State failed to prove the *corpus delicti* with evidence independent of Appellant's own statements to police. (App. Br. 15-16). The term "*corpus delicti*" is used in the context of criminal law to describe the prosecutor's burden of proving that a crime was committed by someone, independent from a defendant's extrajudicial statements. *State v. Madorie*, 156 S.W.3d 351, 353-354 (Mo. banc 2005).

Evidence of the *corpus delicti* need not precede a defendant's admission so long as the essential elements of the crime are proved by the end of the trial. *State v. Evans*, 992 S.W.2d 275, 284 (Mo. App. S.D. 1999). "[A]bsolute

Dublo, 243 S.W.3d at 412. In the present case, of course, Appellant's plans were frustrated by the intervention of law enforcement.

proof independent of his statement or confession that a crime was committed is not required. All that is required is evidence of circumstances tending to prove the *corpus delicti* corresponding with the confession. Slight corroborating facts are sufficient to establish the *corpus delicti*.” *Madorie*, 156 S.W.3d at 355. Here, the evidence apart from Appellant’s statements to police – the purchase of the rifles and ammunition, practicing with the rifles, and hiding them away from his home – were sufficient to establish the *corpus delicti*.

Appellant’s conscious object was to injure or kill any number of victims. Unlike the defendants in *Verweire* and in *Dublo*, Appellant did not voluntarily terminate his plan; rather, he was questioned by police and subsequently arrested. But for police intervention, Appellant could have executed his planned assault. *See generally State v. Rollins*, 321 S.W.3d 353, 361 (Mo. App. W.D. 2010) (in an hypothetical where defendant had purpose to kill or seriously injure the victim, but stopped short of pulling the trigger only because the police suddenly arrived, or because the gun malfunctioned, then defendant could be convicted of attempted murder). As there was sufficient evidence that Appellant’s actions were a substantial toward the commission of assault in the first degree, this point should be denied.

ARGUMENT

II.

The trial court did not err in overruling Appellant's motion to suppress and in admitting Appellant's statements to police because Appellant was not arrested or placed in custody, and before he talked to police, he was given *Miranda* warnings which he said he understood.

A. Background.

Prior to trial, Appellant filed a motion to suppress his statements to police. (L.F. 25-28). Appellant claimed that he had been arrested immediately prior to his statement to police. (L.F. 25). Appellant further claimed that his "arrest" was warrantless and unlawful, as it was not based on probable cause. (L.F. 25-26).

The court took up Appellant's motion at the time his trial commenced. (Tr. 4). The court announced that by agreement, the State would present its evidence regarding Appellant's statements, followed by any evidence Appellant wished to present regarding suppression of his statements, followed by argument and then a ruling by the court on the motion to suppress. (Tr. 4). The court further announced that should it overrule the motion to suppress, the evidence presented by the State would become part of the State's case-in chief. (Tr. 4). Both the State and Appellant agreed with

this procedure. (Tr. 4-5). After hearing the testimony of Patricia Lammers, Officer Mike Sly, and Detective Dustin Ross, the court overruled the motion to suppress. (Tr. 78).

B. Standard of review.

When reviewing a trial court's ruling on a motion to suppress, the reviewing court is limited to determining whether the ruling is supported by substantial evidence. *State v. Rowe*, 67 S.W.3d 649 (Mo. App. W.D. 2002). In reviewing the trial court's ruling on a motion to suppress, the facts and any reasonable inferences to be drawn therefrom are viewed in the light most favorable to the trial court's ruling. *Id.* The reviewing court defers to the trial court's factual findings and credibility determinations, but reviews questions of law de novo. *Id.*

The trial court has broad discretion when ruling on the admission or exclusion of evidence at trial, and an appellate court should not disturb the court's ruling absent a showing of an abuse of that discretion. *State v. Kemp*, 212 S.W.3d 135, 145 (Mo. banc 2007). "[T]hat discretion is abused when a ruling is clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration." *Id.* An appellate court should reverse on claims of error in the admission of evidence only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* "Trial court error

is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial.” *Id.* at 145–146.

C. Appellant’s statements were not obtained in violation of *Miranda*.

Appellant claims that the trial court erred in overruling his motion to suppress the statements he made to police, which Appellant now claims were the result of in-custody interrogation and Appellant’s failure to understand the *Miranda* warnings.

When a suspect is subject to a custodial interrogation, he must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney, either retained or appointed. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). A suspect is in custody when he is formally arrested or is subject to arrest-like restraints. *State v. Dye*, 946 S.W.2d 783, 786 (Mo. App. E.D. 1997). A person who is being asked preliminary, investigatory questions by the police is not in custody for the purpose of requiring a *Miranda* warning. *Id.*; *State v. Barrett*, 41 S.W.3d 561, 565 (Mo. App. S.D. 2001); *State v. Hicklin*, 969 S.W.2d 303, 310 (Mo. App. W.D. 1998). Even if the police become suspicious of the individual they are questioning or the individual becomes the focus of their investigation, a *Miranda* warning is not required unless there is a custodial interrogation. *Id.*; *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

When a defendant voluntarily submits to questioning, this is evidence that the questioning is not custodial. *See State v. Perry*, 954 S.W.2d 554, 563 (Mo. App. S.D. 1997); *State v. Matheson*, 919 S.W.2d 553, 555 (Mo. App. W.D. 1996). Nothing in the record shows that Appellant could not have stopped the questioning prior to making his statement, which supports a finding that Appellant was not in custody. *State v. Seibert*, 103 S.W.3d 295, 301 (Mo. App. S.D. 2003). “Even if a person is a suspect in a crime, there is no custodial interrogation when he is not under arrest or otherwise restrained of his liberty at the time of the questioning.” *Id.* “Treatment with the consideration due one who has volunteered to be interviewed is the kind of latitude [that] is clearly inconsistent with custodial interrogation.” *State v. Hill*, 247 S.W.3d 34, 48 (Mo. App. E.D. 2008).

Here, Appellant was not in custody. When police encountered him at Sonic, Appellant was not placed under arrest, nor was he placed in handcuffs or restrained in any way. (Tr. 29-30, 36-37). Detective Ross asked Appellant if he would come down to the police department and talk to him, and Appellant agreed to do that. (Tr. 29-30, 33, 36). Appellant walked to Detective Ross’s unmarked car and got into the front passenger seat. It was against police policy to allow a person who had been arrested to ride up front without handcuffs. Upon arrival at the police station, Appellant went into an interview room with Detectives Ross and Gorman, with Officer Coots coming

in later. (Tr. 37-38). Detective Ross patted Appellant down for weapons but did not take anything from him. (Tr. 37-38). Appellant had his cell phone with him during the course of the interview, which would not have been permitted had he been under arrest. (Tr. 38). Appellant was not in handcuffs during the interview. (Tr. 38). Inasmuch as Appellant was not in custody, his statements could not have been obtained in violation of *Miranda*.

The record also shows that Appellant was given *Miranda* warnings as soon as the questioning began, even though the police made it clear to him that he was not under arrest. (Tr. 38-42, 50-52, State's Exhibit 5). After Detective Ross asked Appellant if he understood the *Miranda* warnings, Appellant replied that he did. (Tr. 38-42, 50-52, State's Exhibit 5).

In deciding whether a *Miranda* waiver is knowing and intelligent, a court considers the totality of the circumstances. *State v. Powell*, 798 S.W.2d 709, 713 (Mo. banc 1990). "The requirement that a waiver of rights be knowing and intelligent does not mean that a defendant must know and understand all of the possible consequences of the waiver. Rather, it requires that the defendant understood the warnings themselves" *Id.* "A knowing and intelligent waiver of the right to silence is normally shown by having a police officer testify that he read the accused his rights, asked whether the rights were understood, and received an affirmative response." *State v. Schnick*, 819 S.W.2d 330, 335-336 (Mo. banc 1991). This is precisely what

occurred in the present case. (State's Exhibit 5). Appellant's waiver was knowing and intelligent; thus, the trial court's denial of Appellant's motion to suppress was supported by substantial evidence.⁷

Because Appellant was not in custody or under arrest and was advised of the *Miranda* warnings (which he told police he understood) the trial court did not err in admitting Appellant's statements at trial. This point should be denied.

⁷ The State is not required to negate every possible fact which could raise an issue as to the voluntariness of a confession. *State v. Clarkston*, 963 S.W.2d 705, 715 (Mo. App. W.D. 1998). Evidence of the defendant's physical or emotional condition alone, absent evidence of police coercion, is insufficient to demonstrate that the confession was involuntary. *State v. Rousan*, 961 S.W.2d 831, 845 (Mo. Banc 1998).

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 6,034 words as calculated pursuant to the requirements of Supreme Court Rule 84.06(b) as determined by Microsoft Word 2010 software; and

2. That a true and correct copy of the attached brief, was sent through the eFiling system on this 8th day of September, 2015, to:

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